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THE COLLECTIVE LABOR CONTRACT

The practice of precision in the use of terminology, always a virtue, is positively a necessity in the discussion of so controversial a subject as the labor problem. The phrase "collective labor contract" designates the subject of this paper as precisely, within the limits of established usage, as our language permits. Did it not come so perilously near being a barbarism, the longer phrase "collective labor-products contract" might be employed, as it would describe the subject of discourse quite accurately. Were this paper written in French or in German, the accurate terms would be *contrat collectif d'ouvrage* or *Gruppen-Werkvertrag* respectively. To these terms would correspond the English phrase "collective job contract." For the present at least this would probably be misunderstood; although in France the phrase *contrat d'ouvrage* and in Germany the word *Werkvertrag* are well established, both in common speech and in the precise language of the statutes.

If precise terminology is one of the great needs of today in the discussion of industrial relations, an even greater need exists for the proper orientation of thought and practice with respect to the problem. However accelerated its progress may be, industry will reach its ultimate status by next steps and not by leaps and bounds. On the other hand, those who would wisely guide its next steps should orient themselves by what is ultimately possible. That alone is ordered progress toward a goal; all else is drifting. In the taking of such orientation, only two methods are logically possible: the control will be either the outer control of matter of fact; or it will be the inner control of thought. Starting from the present situation in industrial relations—to those most immediately concerned in it admittedly somewhat of a quandary—we may, pursuing the method of trial and error, take a step in this direction or that and then inquire whether it has so altered the situation for us as to leave it more satisfying. Or we may proceed from some project of industrial relations that squares with the logic of thought or is kin to the heart's desire, and endeavor to find some way of approach to it from actuality.

The latter of these two procedures would certainly be an undertaking of "reconstruction" and as such would probably be fought as radicalism or "sovietism," since it seems to be taken for granted that, whatever some European countries may have to undergo by way of reconstruction, in this country there is to be at most "readjustment." Even a "next step," though in itself both reasonable and beneficial, if it should be felt that, with possible further steps, it might fall upon a road leading to a changed order of society, is likely to be halted. The

fate which, as a temporary adversity at least, has overtaken the system of joint control of industry in the Boston and New York clothing trade markets may serve as an example of both forms of resistance.

Choosing the other course for its orientation, the discussion of industrial relations has been rapidly descending during the later months of 1920, to the plane of immediate demands. Almost the only one who, so far, has undertaken to survey the situation with an eye of greater vision has been Mr. Herbert Hoover, notably in his presidential address before the American Engineering Council of the Federated Engineering Societies, in Washington, November 19, 1920. Accepting the development of great voluntary associations to represent economic groups as an accomplished fact of industrial and social evolution, he insists that these economic groups can be brought to live in peace, without compulsory arbitration or other forms of coercion and repression. Going still further, he declares that "these organizations, if our society is to go forward instead of backward, should be considered as the fortunate development of influential groups through which skill and mutual consideration can be assembled for coöperation in the solution of these questions" which, in the prevalence of waste and in the necessity for a positive increase of production, are now so urgently pressing. By this reasoning, he is brought to a conception of collective bargaining that comprehends a great deal more than the determination of wages, hours of labor, and working conditions, a conception that is in essential accord with the thought of the best minds everywhere in the western industrial world.

To realize the potentialities of this conception, Mr. Hoover proposes, as a working program, the adoption of the recommendations of the Second Industrial Conference called by the President. This program is predicated on the basis of the assumption that collective bargaining had been "agreed upon in principle by all sections of the community." Unfortunately, this assumption is hardly justified by the facts; for the employers' group at the First Industrial Conference not only did not accept collective bargaining in principle but expressly denied that there exists a "right to bargain collectively." Members of the group individually and the group as a whole did, to be sure, assert that the employers denied neither "the right to organize" nor the "right to bargain collectively"; but they added the significant reservation, "as we understand collective bargaining." The sense of that understanding of collective bargaining was interpreted by Mr. Frederick P. Fish, as leader of the group, when he drew a distinction between the two rights in question—a distinction which throughout the discussion of the subject of collective bargaining dominated the position taken by the employers' group. The distinction drawn was substantially this: The

right to associate, the right to organize, is a statutory right; the right to bargain collectively is not a statutory right, merely a contractual right, established only by agreement with the employers.¹

The consequences of this position are easy enough to see. Being only a contractual right, dependent upon the meeting of wills, the wage-earners' "right to bargain collectively" is limited by the employer's right to freedom of contract, is subject to his willingness to deal with wage-earners collectively. The likelihood of the universal application of collective bargaining is, therefore, slight. In fact, the employers' group at the First Industrial Conference insisted (and employers that support the open shop movement of today, described as a movement for "the American plan of employment relations," similarly insist) that collective bargaining is not necessary in most industrial establishments. As they argued, approximately 98 per cent of the manufacturing establishments of this country employ less than 250 men, and 95 per cent less than 100 men. In such plants, they said, "there would be the opportunity for personal contact, contact between man and man, which would lead the workman and employer to understand each other's needs and the way in which things should be organized and related in order to get the best results."² Mr. L. F. Loree, another member of the employers' group, even went so far as to say that "personal contact was easily maintained in an establishment under 1000."³ The group agreed, however, that under modern conditions and with establishments beyond a certain size, such personal contact is impossible and declared itself ready to recommend the shop committee plan of employees' representation to the employers of the country as "a most promising plan for improving employment relations."⁴ On the other hand, it would not permit the introduction of any phraseology into any resolution which, if adopted by the conference, might possibly be understood as being a recommendation, by the conference, of collective bargaining with trade and labor unions. Of course, it was conceded that "the employer has a perfect right to agree with his workmen that they shall be represented by anyone, and under those conditions to meet any representatives that they may choose."⁵ That concession, however, is no more than an obvious corollary to the major contention, namely, that the right of collective bargaining is a contractual and not a statutory right.

In stating the grounds upon which it would recommend the shop

¹ See page 161 of the Proceedings of the Conference.

² Mr. Fish, *ibid.*, p. 157.

³ *Ibid.*, p. 196.

⁴ *Ibid.*, p. 245.

⁵ Mr. Fish, *ibid.*, p. 185.

committee type of collective bargaining to employers, the employers' group also gave an interpretation of its understanding of the function and the purpose of collective bargaining, where, "by agreement with the employer," it might be instituted. In the words of its long statement:⁶

The entire spirit of the shop-council plan which the employers' group believes should be fostered and promoted resides in the principle that the employers and employees of an individual establishment should meet to settle their employment relations as nearly as possible on the basis that formerly prevailed when establishments were small and the employees and employer knew each other so intimately that they could negotiate and discuss employment relations face to face.

Mr. John D. Rockefeller, Jr., also held that the best way to the improvement of industrial relations lay in "the resumption of personal relationship between employer and employee or the nearest possible approach thereto," and contended that "some form of representation in industry is essential in order to make personal relations possible under modern industrial conditions."⁷ Mr. Frederick P. Fish, in his address on "Industrial unrest and the remedy" before the 1919 annual meeting of the American Society of Mechanical Engineers, again emphasized the same understanding of the function and the purpose of employees' representation. The Second Industrial Conference, in the first paragraph of the fourth section of its report, expounded a similar conception, declaring: "While the relations between employers and employees are primarily a human problem, the relationship in its legal aspects is one of contract." Finally, the same philosophy was written into the national platform of the Republican party:

We recognize the justice of collective bargaining as a means of promoting good will, establishing closer and more harmonious relations between employer and employees and realizing the true end of industrial justice.

Perhaps it may serve a useful purpose to remind these business men moralists of a characteristic and forceful passage that occurs in William Graham Sumner's essay on *Strikes and Industrial Organization*:

Turning to the moral relation of the subject, we are constantly exhorted to do something to improve relations of employer and employee. I submit that the relation in life which has the least bad feeling or personal bitterness in it is the pure business relation, the relation of contract, because it is a relation of bargain and consent and equivalence. Where is there so much dissension and bitterness as in family matters, where people try to act by sentiment and affection? The way to improve the relation of employer and employee is not to get sentiment into it, but to get sentiment out of it.

⁶ Proceedings, p. 243.

⁷ *Ibid.*, p. 68.

Indeed, so long as those who occupy commanding positions in our industrial society persist in their sentimentalism, reading sentiment into a relationship which, in the very next breath they declare to be a contractual relationship, "a relation of bargain and consent and equivalence," there is little prospect of any improvement in the relations between employers and employed. An obstacle of no less magnitude is the seeming unreadiness of our industrial leaders to see straight the facts of industrial evolution. Regretfully, they look back to the period when all shops were small and tell us that if only the managers of present-day large shops would conduct their establishments as the owners of small shops conducted theirs, and still do conduct them, all the ills and troubles attendant upon the growth of the former would be remedied. If only grown men could be boys again!

Concerning the relation between employers and employed in its legal aspects, and concerning the relation of these aspects to the dominant facts of industrial evolution, these same men offer us an interpretation that is both unhistorical and doctrinaire. For not only do they read the contractual relation between employers and employed in the terms of their eighteenth century politico-legal ideology, they also subsume the facts of industrial history under the concepts of that doctrine.

What we need, therefore, is to do what Sumner urged—to exorcise sentimentalism. That for one thing. For the other thing, we need a realistic acceptance of the facts of industrial history as they actually happened instead of a pragmatic construction of the record to suit the exigencies of contemporary battles of conflicting interests.

Where will such realism lead us? As to a point of departure, back to Adam Smith and to the manner of his approach to the problems of industrial society in the famous first chapter of the *Wealth of Nations*. So far at least, one must agree with Professor Walton H. Hamilton's call⁸ "back to Adam Smith." On the other hand, we cannot accept today the conclusions drawn by some of Smith's followers and we must see clearly that certain inadequacies in Smith's introductory chapter on the division of labor have, in fact, become the foundation of subsequent misreading of industrial history and industrial organization.⁹

⁸ "Since Smith, economics has wandered far from the division of labor as a point of departure. This is but saying that it has at least partially lost sight of its essential problem of explaining the organization of industrial society, or of describing 'the economic order.' Yet, because of machine technique, the division of labor has become more important than it was in Smith's time." "The Place of Value Theory in Economics," *Journ. Pol. Econ.*, vol. 26 (Mar., 1918), p. 231, n. 1.

⁹ The most obvious phenomenon in the entire structure of the economic acquisitive community is the division of labor. The fact of the division of labor is more obvious than the fact of the acquisitive community itself, and therefore was observed

In following the call "back to Adam Smith," we must, therefore, take full account of the criticism of Smith's account of the division of labor which was initiated by Wakefield, who, in his edition of the *Wealth of Nations*, "reduced the division of labor or separation of employments to its proper place as only a part of the coöperation which increases the productiveness of labor,"¹⁰ when he wrote:¹¹

All writers on political economy from Adam Smith downwards, while treating of the "causes of improvements in the productive powers of labor," have overlooked a principle of first-rate importance. This principle is, that all improvements in the productive powers of labor, including division of employments, depend upon coöperation.

How far must we go in the consideration given to coöperation as an economic principle? Shall we go only as far as Bücher does in his lecture on *Arbeitsvereinigung und Arbeitgemeinschaft?*¹²

Without doubt the real reason for the formation of the concept of the union of labor and for its long retention in the literature of the science is the vague feeling that there must be an *economic* principle forming the counterpart of division of labor. Coöperation it cannot be, for that is identical with certain forms of division of labor, its "other side." What then is this principle?

Bücher answers his own question in a way that leaves practically the whole field of modern industrial society to be governed by the principle of the division of labor, though he himself, in a lecture written before the one quoted above, but retained unaltered in the latest edition of his series of lectures, had criticized other economists¹³ for explaining our industrial society almost wholly by that single principle. Or shall we follow the analysis Wakefield has given us, perhaps carrying it somewhat beyond the point where he has left it?

before the latter; it was not until later that it was recognized that the division of labor which had been noted was only the expression of a great coöperative community of all those who share in the labor. The division of labor fell in particularly well with the trend of thought of the classical masters, for it adapted itself to their theory of labor and to their individualistic conceptions, both of which put the individual working person into the foreground of the theoretical inquiry. Adam Smith, from his point of view, could not open his work on the *Wealth of Nations* more fittingly than with reflections upon the extraordinary effects of the division of labor, of which he says that it, more than any other cause, had contributed to improvements in the productive powers of labor. Friedrich von Wieser. In his *Theorie der Gesellschaftlichen Wirtschaft*, Erstes Buch. A III, p. 342 f. Bd. I, *Handbuch der Sozialökonomik* (1914).

¹⁰ Edwin Cannan, *Theories of Production and Distribution*, p. 50.

¹¹ In his note to the first chapter of the *Wealth of Nations*, p. 26.

¹² In his *Entstehung der Volkswirtschaft: Vorträge und Aufsätze*, Erste Sammlung, 12 u. 13. Aufl., p. 269 (1919). English translation by S. Morley Wickett, p. 250.

¹³ *Ibid.*, p. 324.

There is, I believe, a fundamental difference between Bücher's analysis and Wakefield's analysis.¹⁴ This difference does not result, chiefly, from the greater comprehensiveness of Bücher's treatment; it consists, rather, in a difference of point of view. Bücher's emphasis is largely upon the distinction of stages in the evolution of economic life, a scientific problem in which Professor Bücher is much interested. Adam Smith was similarly interested, and one of the reasons for his interest was the practical intent of bringing about a change in the economic life of his own time and country. But the dominant point of view in the famous first chapter of the *Wealth of Nations* is the point of view of what we should today describe as "job analysis." That too is the point of view that dominates the first part of Wakefield's note, and there is in his correction of Smith's job analysis much that is valid not only as against Smith but even more so as against Bücher.

Wakefield, first of all, makes the point that the term "division of labor" has commonly been used—as it was used by Adam Smith—"as a most improper term." Throughout the text of his edition of the *Wealth of Nations* he, therefore, inserted the word "employments," in brackets, after the word "labor," contending that what is divided is not "the muscular exertion" expended in "the operation, work, or business which is performed by labor" but this "operation, work, or business" itself. Adam Smith, he declares, had confounded division of labor with division of employments. Recalling that Smith had said that "the woolen coat, for example . . . is the produce of the *joint labor* of a great multitude of workmen," he remarks: "here, then, labor is said to be united, as in fact it is whenever employments are divided"; and he adds: "Division of employments, with all its great results, depends altogether on combination of labor, or coöperation." Bücher, on the other hand, says that *die Kooperation* is "identical" with "certain forms of the division of labor"; for instance, as he adds in a footnote, with what he calls "division of production" (*Produktions-teilung*) and "subdivision of labor" (*Arbeitszerlegung*), but not with division of employments.

Further analyzing this principle upon which so much depends, Wakefield finds that:

Coöperation appears to be of two kinds: first, such coöperation as takes place when several persons help each other in the same employment; second, such coöperation as takes place when several persons help each other in different employments. These may be termed simple coöperation, and complex coöperation. It will be seen presently that until men help each

¹⁴ Bücher does not mention Wakefield's note. He refers, however, to a distinction made by French writers (he instances Cauwès) between "simple coöperation" and "complex coöperation," a distinction that appears in Wakefield's note.

other in simple operation, they cannot help each other in operations which consist of several parts.

As examples, of simple coöperation, Wakefield then names a number of operations, not all equally simple, of which we may mention the simplest, such as several persons helping each other in lifting heavy weights, felling trees, pulling ropes on board ship, or rowing large boats. In Bücher's classification, this is represented by the subdivision *Arbeitshäufung* (still further subdivided) under *Arbeitsgemeinschaft*, which takes place when, in the quantitative disproportion between the work to be done and the labor power of the individual, the task is greater than a single man can accomplish. This simple coöperation, Wakefield says, "is the first step in social betterment"; and he continues:

What is true of two bodies of men applies to any number of bodies, however great the difference in their occupations; and thus we perceive that the division of employments, the power of exchanging, and the possession of capital are all dependent on the combination of labor in simple operations.

Such combination of labor in simple operations having been learned, men become able to help each other in "operations which consist of several parts." The division of employments depends upon coöperation. Its first stage is the division of production; the second stage is what Bücher calls "subdivision of labor" (*Arbeitszerlegung*), what Wakefield would describe as the division of an operation into several parts. When one person undertakes to do one part and another performs the other, we have "complex coöperation," "however great the difference of their occupations." We arrive at what Bücher describes as "specialization or division of trades."

Before proceeding to the practical conclusions which may be drawn from this principle of coöperation, it seems right to Wakefield to note an important distinction between simple and complex coöperation. Of the former, one is always conscious at the time of practicing it; it is obvious to the most ignorant and vulgar eye. Of the latter, but a very few of the first minds who practice it are in any degree conscious. The cause of this distinction is easily seen. When several men are employed in lifting the same weight, or pulling the same rope, at the same time, and in the same place, there can be no sort of doubt that they coöperate with each other; the fact is impressed on the mind by the mere sense of sight; but when several men, or bodies of men, are employed at different times and places, and in different pursuits, their coöperation with each other, though it may be quite as certain, is not so readily perceived as in the other case; in order to perceive it, a complex operation of the mind is required. And here, perhaps, we may discover the occasion of Adam Smith's error in confounding division of labor with division of employments, which are really incompatible with one another.

Beyond this point Wakefield has not carried his job analysis, for

he then proceeded to the "practical conclusions" that he wished to draw; and these practical conclusions lean upon that larger economic organization with which he, no less than Adam Smith (and, after all, Bücher too), was primarily concerned. Smith was not primarily interested in job analysis, though the first chapter of his work is a fine example of it; he was interested primarily in *political economy*, in the wealth of nations.

And for Bücher, the division of employments that he sees beginning in the Middle Ages, and the displacement of labor (*Arbeitsverschiebung*) by mechanical inventions that began in the seventeenth century, predominate in modern industrial society. What Wakefield described as a form of "simple coöperation" he describes as *Arbeitsgemeinschaft*, of which he distinguishes three main classes: (1) social labor (*Gesellschaftsarbeit; gesellige Arbeit*); (2) labor aggregation (*Arbeitshäufung*); (3) joint labor (*Arbeitsverbindung*), i.e., work in squads, gangs, sets. All these, he finds, "play their chief rôle during primitive stages of development and in the lower strata of a developed economic community." So there is little room, in Bücher's system, for *die Kooperation*; and it is not surprising that he reduces it to identity with "certain forms of the division of labor," and these, so far as he specifies, the more primitive forms of the latter. The explanation is, of course, easy to see: the ensemble effect in the operations of productive labor which, in the early stages of industrial development, is produced by direct coöperation of the laborers, in the later stages of development is a *superinduced effect*, brought about through the entrepreneur. That is to say, in their preoccupation with the functions of the entrepreneur, many economists seem to see only the most complex phases of what Wakefield described as "complex coöperation." Consequently job analysis—toward which Adam Smith had made such a splendid beginning, incidentally perhaps—has suffered neglect. Of late, thanks to the attention which scientific management is gradually beginning to receive from some economists, there promises to be a return to Adam Smith's point of departure. The contribution by Gottl. von Ottienfeld to the *Handbuch der Sozialökonomik*¹⁵ is so far, perhaps, the most striking example of that movement in a work on economics. On the other hand, when Professor Henry Clay, whose book, after a methodological introduction, opens with a chapter on division of labor, says that "the latest economy in business organization, the so-called scientific management, is a conscious application of" division of labor, he is only half right. The scientific managers, to be sure, speak of "functional foremanship" and Frederick W. Taylor distinguished between

¹⁵ *Wirtschaft und Technik*, Erstes Buch, B and v.

"planning" and "execution." On the other hand, under the system of planning, scheduling, and routing production in a modern shop under scientific management, every step in the process of production must be closely adjusted to every other. There must be coördination, and that coördination is not purely an ordering *ab extra*, in which the worker is wholly passive. We have it on the word of Taylor himself, that the effect and aim of scientific management, however minute the subdivision of operations it may entail, is not to eliminate all brain work on the part of the workmen. Quite the contrary. The coördination called for is, in other words, coöperation, which is wholly a mental function.

The time will come—and there are indications that we are rapidly approaching it—when production engineers will see quite clearly that the division of labor or separation of employments is only "a part of the coöperation which increases the productiveness of labor." When they do, we shall have a survey of employments for the purpose of noting the various ways in which coöperation of different degrees of simplicity or complexity is exemplified therein. Then, knowing the natural organization of work, we shall provide, as the economic correlate of its technological organization, the proper form of remuneration for productive labor.

If, then, coöperation is the more basic fact in industrial organization, on its technological side, the division of labor and the separation of employments depending upon it, one would think that consequently the economic organization of industry—which includes the remuneration of productive labor—would likewise be primarily determined by the fact of coöperation and only secondarily by division of labor and separation of employments. Historically this has not been the case except in a limited way. And today, when every one that will can see that since 1880 or thereabouts we have been passing through another industrial revolution which is bringing about ever greater integration in our industrial organization, we are asked to consent to a still greater separation of the method of remunerating productive workers from the rightfully controlling facts of the natural organization of their work.

In the remuneration of productive laborers that "help each other in the same employment," involving only "simple coöperation, we have not only made little progress toward rational methods, but on the contrary we have positively retrogressed. It is in this field that Thomas Brassey, in his day, set an example which today seems almost forgotten. His biographers, Sir Arthur Helps¹⁶ and H. H. Page,¹⁷

¹⁶ Sir Arthur Helps, *Thomas Brassey* (1873).

¹⁷ H. H. Page, "Thomas Brassey; the Organizer of Labour," in his *Golden Lives* (2d edition 1873).

both relate that the great English contractor early saw the necessity of developing, for his great operations, the system of sub-letting parts of the work to sub-contractors. On the other hand, "in every way he would promote the 'butty-gang' system—by means of which a certain piece of work was let out to some ten or fifteen men, among whom the proceeds were divided equally, with something extra for the head man in charge."¹⁸ This butty-gang system as it was operated under Brassey, was, of course, not the same as the system that is known by that name and still practiced in some British coal mines; for that is simply a system of sub-contracting, like the contract system that seems to be favored by some coal mine operators in this country.¹⁹

What Brassey favored was rather more like the collective contract system used by the Italian *bracchianti* and other laborers organized in *Società di Lavoro* under the permissive statute of 1889. The same system of organizing work and organizing the distribution of the social income from productive labor has been employed in occupations where the coöperation is of the nature of "complex coöperation." Wherever, in fact, men have worked in gangs, squads, or sets, there has been a tendency for them to seek their remuneration in groups. That tendency has been greatest, naturally, where it is difficult, if not impossible, to determine accurately the specific contribution of each individual worker to the product. Where the pay of such gangs or squads takes the form of payment by results, the work may be described as "job piece-work"; the pay becomes a group piece-rate. The contract of employment of each member of the gang may be based upon individual bargaining; or its terms may be stipulated in a trade agreement and fixed in the individual contract accordingly; or each gang or squad may hire out as a contracting fellowship. However the management may apportion the total pay of the gang, its members can and do exercise considerable free control over the actual apportionment and have been known to pool their wages and to make a redistribution according to an agreed schedule of their own. Even in this country, among riveting gangs in the shipyards, the riveter and the holder-on, though not paid equally on the company's books, may divide their joint quota of the total weekly earnings of the gang on a fifty-fifty basis. This goes to show that, however "individual" the contract may be for the employer, the workmen, knowing the coöoperative nature of their work, are likely to look upon themselves as a contracting fellowship.

Where the operation consists of several parts which are so far sep-

¹⁸ H. H. Page, *op. cit.*, p. 143.

¹⁹ See *Coal Age*, several letters reporting active efforts, during the latter half of last year.

arable that a separation of employment takes place, the situation is somewhat different. Whether the workers are paid by time or by result, their employers emphasize that each of them is hired under an individual contract of employment. The workers are less conscious of being engaged in a joint labor than would be the case if their coöperation were more direct and "simple." Consequently, where they take any common action, this action is likely to stop at "collective bargaining," whereas gangs and squads of men have always tended to act in greater unison, that is as contract fellowships. Now the difference between a "collective bargain" and a "collective labor contract," in law as well as in practice, is that the former merely *stipulates* the terms of individual contracts—as many contracts as there are workers in any way affected by the bargain; while the collective labor contract is *itself a contract*, namely one contract for all the workers coöperating. The collective labor contract, in other words, is the economic correlate of the organization of work, technically, as coöperative. With the work of the world's industries becoming more and more coöperative, scientific management consciously bringing about more and more co-ordination, is it not surprising that there are relatively so few collective labor contracts?

The answer is easy enough. What has determined the manner of remunerating workers for their labor has not been the organization of their work but—*horribile dictu!*—what Rodbertus called "social categories" and Karl Marx "historical categories."

However, the facts are forcing some recognition. Even under a system of individual contracts of employment a "group bonus" has been found an advantage,²⁰ and such bonus is nothing less than a distinct remuneration for that portion of his specific productivity imputable to each man on the score of his "coöperation." Many other "efficiency bonuses," while not explicitly denominated "group bonus" systems, in reality depend upon "coöperation"; and coöperation, by definition, is operation in a group.

Further progress in this direction will depend upon overcoming that

²⁰ Mr. J. D. Town, writing of an experience in the foundry of the Electric Steel Company, Chicago, says of a crane crew, which had been offered a group bonus: "They understood that if any one man in the crew was cause of a penalty being given, not only this man, but the other five, must stand the loss of bonus, and on this account the crew who previously would not coöperate, met privately and agreed that any man whom the other five thought was not giving his best service, would be told about it and if no improvement was shown, the management would be asked to dismiss him. This agreement was bound by general hand-shaking and from that time on the crew could never be accused of lacking coöperation." "Common Labor Responds to Incentives: Satisfactory Results of Introducing a Bonus System in a Foundry," *Industrial Management*, vol. 60 (Dec., 1920), p. 424.

"dislike of exactness" which, Herbert Spencer said, long stood as an obstacle to the full passage from a system of status to a system of contract. Spencer, who has been much chided for what he has said of "free labor and contract," did not, I think, make enough of this point. For him the distinctive mark of unfree labor is that its status is defined upon a basis of "coerced labor and assigned sustenance." He saw clearly enough that "a wage-earner, while he voluntarily agrees to give so much work for so much pay, does not, during performance of his work, act in a purely voluntary way"; and he pointed out that absence of purely voluntary action is due to the consciousness, on the part of the worker, of being under the supervision of an overseer. In advocating, for this and other reasons, a collective labor contract, Herbert Spencer emphasized that under such arrangement the worker's activity "becomes entirely voluntary." Now, important as it is that the worker's activity be voluntary, it is vastly more important to see that it is not and cannot be "purely voluntary" *because of the quantitative indeterminateness of the task which the worker undertakes* when he agrees, however voluntarily or involuntarily, "to give so much work for so much pay." Under the free-labor-and-wage system, the time-wage a worker receives is a determinate quantity; the task which he must perform is an indeterminate quantity, becoming determinate only as the work proceeds. It is this indeterminateness of his task which is the cause of the "servant's" status as servant in the master-and-servant relationship. In law what makes him a servant is the fact that, in the method of doing the work to which he is assigned, he is subject to the order of his employer; a worker who is not so subject to the employer's order and responsible only for the result of his effort, subject to inspection and acceptance by the purchaser of the product of that effort, is not a servant but an independent contractor. Many classes of workers have, by opinion of the courts, been declared to be such independent contractors. But the court does not go behind the fact of the worker's independence of the employer's order to the economic fact that, as such independent contractor, he undertakes a quantitatively determinate task for a definite sum of money. It is this economic fact that makes the employer willing to vacate his control over the worker's method of accomplishing his task. He does not desire supervision; inspection of the product delivered is all he requires and all he retains. Inspection, however, is sufficient only because the agreement between him and the worker covers a determinate "quid" for a determinate "quod." To put it briefly, I would amend Herbert Spencer's reasoning, and, instead of saying that any "dislike of exactness" prevents the ready acceptance of contractual relations, would say that the knowledge—or the fear—of the non-existence of exactness

is the real obstacle. The ordinary labor contract, in fact, is nothing but a pseudo-contract—whatever the courts may hold—where it is based upon the worker's "time" or effort, on the one hand, and a fixed time-wage on the other, the reason being the inexactness inseparable from the worker's "time" or effort as a consideration. Moreover, all the time-study men together may work from now till doomsday and yet they will never achieve exactness sufficient to make a worker's "time" a proper basis for a contractual relationship.

It has been pointed out that wherever a piece rate is introduced the workers show an inclination to demand that they be paid as a group if they clearly recognize the jointness of their labor. What is the explanation? The answer may be put as follows: contract depends or should depend upon exactness in the specification of the terms of exchange. But there is a limit to exactness; for there are intangible things in this world, and one of these is "coöperation." By contract, we may bind ourselves to give an exact quantity of one thing in exchange for another; out of this exactness of equivalent exchange results the obligation under a contract. But a contract can never cover intangible values; with such values we part only upon the basis, not of contract, but of loyalty. And right here is where the ways of social theory part. At the end of the road of one course lies contractual relationship. At the end of the road of the other course lies—not "status" but coöperation. The one results in an obligation; that obligation is terminated only by performance. The other results in an agreement of a different sort, an agreement that outlasts any given performance. The performances done under it are "common acts in collaboration"²¹ (*Gesamtakte*, a German word Léon Duguit borrows to define his own meaning). The values with which the group that acts in collaboration is concerned are that fringe of intangible, but real, values that surrounds the definable body of every act. The definable body of an act to be performed can become the subject of contract; the rendering of intangible values remains subject to loyalty²² and the

²¹ Léon Duquid, in his *Le Droit Social, le Droit Individuel et l'Etat*, second edition, Paris, 1911, translated into English by Frida and Harold Laski under the title *Law in the Modern State*, 1920. See there page 113. Also Léon Duguit, "Collective Acts as Distinguished from Contracts," *Yale Law Journal*, vol. 27 (April, 1918), 753-68. Also, for historical treatment, Dr. W. Silberschmidt, "Gewerkschaft, Gesellschaft, Juristische Person" in *Archiv für Rechts- und Wirtschaftsphilosophie*, vol. XI, no. 4, and vol. XII, nos. 1 and 2 (July, 1918-Jan., 1919).

²² On the historical relation between a relationship based on loyalty and the labor contract in Germanic law see Otto von Gierke's contribution to the *Festschrift für Heinrich Brunner* (1914) on "Die Wurzeln des Dienstvertrags." Also Roscoe Pound, "A Feudal Principle in Modern Law," *International Journal of Ethics*, vol. 25 (Oct., 1914), p. 1-28.

whole record of human history is proof that free groups—be they small groups of only two persons, as in the monogamous family, or groups of many members, such as a collective contract fellowship would be—are bound to be—set up to become the beneficiaries as well as the guardians of that loyalty and of the intangible values rendered.

It will easily be seen, now, where mere “collective bargaining” differs from the action of the members within the collaborating fellowship. Collective bargaining seeks no more than to stipulate the terms of individual contracts of employment with respect to the exchange of what shall be regarded as fair equivalents. Fair equivalence under a time wage may be achieved, but to say that it can be determined by contract is an absurdity. This is the real explanation of the failure of collective bargaining to find universal application. Pass from time-wage to payment by results and apply collective bargaining with respect to the terms of the bargain, and you have set your foot upon the road that leads to collective contract. The intangible value of co-operation remains, and it is not subject to contract and will be rendered only to a *fellowship*. We may contract with an alien; we give our loyalty only to our own, our fellows. But—and that is the point for employers to see—the contracting group, which can command the loyalty of its fellows, can afford to give better value *when it makes a contract* than the equivalent of what would be the sum of all the values given by its members, severally, were they to make individual contracts in severalty. It can afford to give better value because it can put into play, can release because it can hold, the loyalties of men. It can afford to give better value because it can tap the “vital reserves” of men so well described by William James in his address on *The Energies of Men*.

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